

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2003 MTWCC 51

WCC No. 2002-0676

DALE REESOR

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer.

DECISION AND JUDGMENT

REVERSED AND REMANDED 12/22/04 in

[Reesor v. Montana State Fund, 2004 MT 370 \(No. 03-639\)](#)

Summary: Claimant was receiving social security retirement benefits at the time he suffered an industrial accident. He received an impairment award but was denied other permanent partial disability (PPD) benefits pursuant to section 39-71-710, MCA (1999), which provides that persons who are receiving social security benefits or are eligible for full social security retirement benefits are ineligible for PPD benefits other than an impairment award. Claimant challenges the constitutionality of section 39-71-710, MCA, on equal protection grounds and seeks full PPD benefits.

Held: Section 39-71-710, MCA, is constitutional. Receipt of retirement benefits or eligibility for such benefits is a rough yardstick for determining whether there will be future wage loss. Such rough measures do not violate equal protection guarantees.

Topics:

Constitutional Law: Equal Protection. The Equal Protection Clause does not forbid the use of rough yardsticks in furtherance of legitimate governmental purposes.

Constitutional Law: Equal Protection. Section 39-71-710, MCA (1999), which denies permanent partial disability benefits other than impairment awards to workers receiving social security retirement benefits or who are eligible for full social security benefits does not violate the Equal Protection Clause. Workers' compensation benefits are a partial replacement for lost wages. Age and retirement are rough measures of the time workers stop working and stop suffering wage loss.

Benefits: Permanent Partial Disability. Section 39-71-710, MCA (1999), which denies permanent partial disability benefits other than impairment awards to workers receiving social security retirement benefits or who are eligible for full social security benefits does not violate the Equal Protection Clause. Workers' compensation benefits are a partial replacement for lost wages. Age and retirement are rough measures of the time workers stop working and stop suffering wage loss.

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-710, MCA (1999). Section 39-71-710, MCA (1999), which denies permanent partial disability benefits other than impairment awards to workers receiving social security retirement benefits or who are eligible for full social security benefits does not violate the Equal Protection Clause. Workers' compensation benefits are a partial replacement for lost wages. Age and retirement are rough measures of the time workers stop working and stop suffering wage loss.

¶1 The sole issue in this case is the constitutionality of section 39-71-710, MCA (1999), insofar as that section denies permanent partial disability (PPD) benefits to workers receiving social security retirement benefits or who are eligible for full social security retirement benefits.

Stipulated Facts

¶2 The parties submit the issue on an agreed statement of facts. Those facts are as follows:

¶2 a On January 13, 2000, the Petitioner, Dale Reesor, was injured in the course and scope of his employment with Northwest Equipment in Cascade County, Montana.

¶2b Mr. Reesor injured his right shoulder when he fell from the back of a truck.

¶2c Mr. Reesor was born on May 24, 1934, so at the time of this injury he was 65 years old.

¶2d On May 10, 2002, Mr. Reesor reached maximum medical improvement (MMI). He has a 4% impairment rating as a result of the subject injury.

¶2e The State Compensation Insurance Fund (State Fund) paid temporary total disability benefits to Mr. Reesor from January 22, 2000 to August 2, 2002. The State Fund paid permanent partial disability (PPD) from June 10, 2002 to September 15, 2002, for a total of 14 weeks of PPD/Impairment benefits. The State Fund paid 14 weeks of PPD/Impairment benefits, because 4% multiplied by 350 weeks equals 14 weeks. Therefore, Mr. Reesor received \$2,975.00 in PPD/Impairment benefits.

¶12f Mr. Reesor began receiving full Social Security retirement benefits in the amount of \$505.00 beginning on May 24, 1999, because that was the month and year of his sixty-fifth birthday.

¶12g Other than the 14-week PPD/Impairment benefit award, Mr. Reesor received no other PPD benefits from the State Fund.

¶12h Pursuant to §39-71-710 MCA (1999), the additional PPD factors of age, education, lifting restrictions, and wage loss were not paid to Mr. Reesor.

¶12i If Mr. Reesor had been eligible for the additional PPD benefits pursuant to the factors of age, education, lifting restrictions, and wage loss, as set forth in §39-71-703 MCA (1999), Mr. Reesor would have received an additional PPD entitlement as follows:

a)	Age:	1%	(Birth date - 5/24/34)
b)	Education:	1%	(7th Grade - No GED)
c)	Wage Loss:	20%	(More than \$2.00 per hour)
d)	Lifting:	5%	(Heavy to Light)
	Total:	27%	

Additional PPD benefits at 27% are converted to a number of weeks by the following formula: 27% multiplied by 350 weeks for a total of 94.5 weeks. This additional number of weeks is then multiplied by Mr. Reesor's PPD rate of \$212.50 per week. Therefore, additional PPD benefit[s] would be \$20,081.25

(Joint Stipulation of Facts at 1-2.)

Statute at Issue

¶13 39-71-710. Termination of benefits upon retirement.

(1) If a claimant is receiving disability or rehabilitation compensation benefits and the claimant receives social security retirement benefits or is eligible to receive or is receiving full social security retirement benefits or retirement benefits from a system that is an alternative to social security retirement, the claimant is

considered to be retired. When the claimant is retired, the liability of the insurer is ended for payment of permanent partial disability benefits other than the impairment award, payment of permanent total disability benefits, and payment of rehabilitation compensation benefits. However, the insurer remains liable for temporary total disability benefits, any impairment award, and medical benefits.

(2) If a claimant who is eligible under subsection (1) to receive retirement benefits and while gainfully employed suffers a work-related injury, the insurer retains liability for temporary total disability benefits, any impairment award, and medical benefits.

Discussion

¶14 In challenging the constitutionality of section 39-71-710, MCA, claimant carries a heavy burden. He must persuade the Court beyond a reasonable doubt that the section is indeed unconstitutional. *Grooms v. Ponderosa Inn*, 283 Mont. 459, 467, 942 P.2d 699, 703 (1997).

¶15 Equal protection of the laws is guaranteed under both the United States and Montana Constitutions. Section 1 of the Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The corollary protection in the Montana Constitution is in Article 2, section 4, which provides, "No person shall be denied the equal protection of the laws." The provisions "provide generally equivalent but independent protection." *Emery v. State*, 177 Mont. 73, 79, 580 P.2d 445, 449 (1978).

¶16 The equal protection guarantee does not forbid different treatment of different groups or classes of people. "[M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decision makers from treating differently persons **who are in all relevant respects alike.**" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added) and see *Davis v. Union Pacific R. Company*. As stated in *Zempel v. Uninsured Employers' Fund*, 282 Mont. 424, 432, 938 P.2d 658, 663 (1997), "[I]t is critical to recall that equal protection does not require that all persons be treated alike regardless of whether their circumstances are the same; it requires only that all persons be treated alike under like circumstances."

¶7 In this case, a younger worker below the social security retirement age who suffers the same injury and disability as Mr. Reesor is eligible for additional PPD benefits based on age, education, lifting restrictions, and wage loss. § 39-71-703, MCA (1999). The only difference between the younger worker and Mr. Reesor is age and, in turn, eligibility for or receipt of social security retirement benefits.

¶8 The equal protection question is whether the unequal treatment of workers receiving social security benefits, or who are deemed retired, "rationally furthers a legitimate state interest." Nordlinger, 515 U.S. at 10. While claimant urges a heightened scrutiny, the Montana Supreme Court has consistently held that classifications in workers' compensation matters are not subject to heightened scrutiny. *Powell v. State Compensation Ins. Fund*, 2000 MT 321, ¶ 21, 302 Mont. 518, 15 P.3d 877. I am not persuaded by claimant's argument that heightened scrutiny should apply in this case because the classification at issue in this case is based on age. Age distinctions are often found in the law. *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (1986), cited by claimant in support of his argument is inapposite. In that case, the Supreme Court held that classifications concerning welfare benefits were subject to heightened, middle-tier scrutiny because welfare is considered sufficiently important that the Constitution makes specific provision for welfare benefits.(1) *Id.* at 434, 712 P.2d at 1313. Claimant concedes that age is not a protected class in the Montana Constitution but argues that his "right of pursuing life's basic necessities", Art. II, § 3, Montana Constitution, provides a basis for heightened scrutiny. However, claimant's right to work or pursue necessities is not at stake in this case. I therefore find no basis for departing from the traditional "rational basis" test.

¶9 I have previously addressed the constitutionality of section 39-71-710, MCA, under the rational basis test. In *Black v. MDMC/Benefis Healthcare*, 2001 MTWCC 47, I upheld the constitutionality of the 1997 version of section 39-71-710, MCA. The 1999 version of the section is identical to the 1997 version.

¶10 In *Black* I surveyed decisions from other jurisdictions. *Black* at ¶ 36. While I found a split of authority concerning age-related limitations on benefits, a majority of jurisdictions have upheld the constitutionality of age-related, retirement based limitations on benefits. *Id.* I pointed out in *Black* that "workers' compensation, unemployment and old age (social security retirement) benefits all serve the singular purpose of replacing lost wages and are therefore interrelated." ¶ 38. I further pointed out that while not every worker retires at age 65, that age is a "rough" predictor of retirement from the labor market, and thus a rough predictor of the end of wage loss. Finally, I relied on *Kimel v. Board of Regents*, 528 U.S. 62, 83-84 (2000), which held that states may discriminate on the basis of age without violating equal protection guarantees. In that case, the United States Supreme Court expressly held that "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the States legitimate interests." ¶ 39 (original bolded; underlining added).

¶11 I refer the reader to the full text of the Black decision, which is attached. I find no reason to depart from what I said and held in Black. Accordingly, I conclude that section 39-71-710, MCA (1999), on its face and as applied in this case, does not violate the claimant's right to equal protection of the laws. Therefore, he is not entitled to PPD benefits other than the impairment award already paid.

JUDGMENT

¶12 The provisions of section 39-71-710, MCA (1999), which deny PPD benefits other than impairment awards to workers receiving social security retirement benefits or who are eligible for full social security retirement benefits does not violate the equal protection clauses of the Montana and United States Constitutions. Claimant, who was receiving social security retirement benefits when injured at work, is not entitled to PPD benefits. His petition is **dismissed with prejudice**.

¶13 This Judgment is certified as final for purposes on appeal.

DATED in Helena, Montana, this 22nd day of July, 2003.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Thomas J. Murphy

Mr. Thomas E. Martello

Submitted: March 28, 2003

Attached: [Black v. MDMC/Benefis Healthcare, 2001 MTWCC 47](#)

1. Article 12, section 3 (3) of the Montana Constitution provides:

(3) The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need.